Supreme Court, U.S.
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No. 95-887

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT W. WAYMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE – ATLANTA CHAPTER IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346 (1988), which defines mail and wire fraud as including schemes to deprive others of "the intangible right of honest services," denies public officials and other fiduciaries prosecuted under its authority their Fifth Amendment due process right to notice of what conduct constitutes a crime.

2. Whether a public official who has failed to fully disclose a private business relationship may be convicted of mail or wire fraud for depriving his constituents of "the intangible right of honest services," 18 U.S.C. § 1346 (1988), absent any finding that he sought to use the authority of his office to promote the private business relationship.

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association for the Advancement of Colored People for the City of Atlanta, the Atlanta chapter of the National NAACP, has for the past seven decades been devoted to promoting equal rights for African-Americans. It is also committed to protecting the integrity and vitality of the electoral process at all levels of government.

The central issue in this case -- whether 18 U.S.C. § 1346 (1988) is unconstitutionally vague -- is of great concern to *amicus*. This provision fails to give state and local elected officials adequate guidance as to when a mere failure to disclose information, such as information about personal business dealings, may give rise to a federal mail or wire fraud prosecution for depriving constituents of their "intangible right of honest services."

Amicus discerns two particularly troubling consequences of the continued enforcement of Section 1346. First, the vagueness of the statute may well "encourage [its] arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), at a very time when the perception, if not the reality, is that prosecutors are increasingly targeting African-American public officials. Second, as a result of the enforcement of the statute against elected officials such as petitioner here, others may be discouraged from seeking state or local office.

SECTION 1346 THREATENS SELECTIVE PROSECUTION AGAINST LOCAL GOVERNMENT OFFICIALS

Section 1346 defines mail and wire fraud to include schemes to deprive others of "the intangible right of honest services." 18 U.S.C. § 1346 (1988). The statute provides no further definition, however, of what constitutes "honest services," or what conduct

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[1] Counsel for both petitioner Robert Waymer and respondent the United States have consented to the filing of this brief. *Amicus* has filed those consents with the Clerk of this Court.

may give rise to prosecution for depriving others of one's "honest services."

It is particularly unclear when a public official's mere failure to disclose information about his private business dealings may support a criminal conviction under this provision. The statute itself provides no guidance at all. The courts have said only that the undisclosed information must somehow be "material." *See, e.g, United States v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1995). But "material" to what? In this case, for example, the Eleventh Circuit did not require that petitioner's personal business dealings — the information that he only partially disclosed — be "material" to any matter that actually came before the Atlanta school board during his tenure. The concept of materiality does not, therefore, resolve the uncertainty over what Section 1346 criminalizes.

The vagueness of the "honest services" provision has been frequently noted by judicial scholars. One commentator has characterized this "statutory right to honest services," for example, as "an undefined, amorphous right with uncertain boundaries." Geraldine Szott Moohr, *Mail Fraud And The Intangible Rights Doctrine: Someone To Watch Over Us*, 31 HARV. J. LEGIS. 153, 171 (1994); *see also, e.g.*, Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature Of The Mail Fraud Statute*, 36 B.C. L. REV. 435, 464 (1995) (Section 1346 fails to "clearly describe[] the scope of the perceived harm and the nature of the acts that will subject a person or entity to federal criminal prosecution"); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 153 (1990) (Section 1346, "with its ambiguous language concerning 'intangible rights of honest services,' . . . expands the vagueness problems of the mail fraud statute").

Indeed, Section 1346 presents the same vagueness problems that previously raised concerns under the judicially created "honest services" doctrine: It fails to provide "even the vaguest contours of the legal obligations created beyond the obligation to

conduct governmental affairs 'honestly' or 'impartially,' to ensure one's 'honest and faithful participation' in government and to obey 'accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.'" *United States v. Margiotta*, 688 F.2d 108, 142-43 (2d Cir. 1982) (Winter, J., concurring in part, dissenting in part) (quoting *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir.), *aff'd in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980)), *cert. denied*, 461 U.S. 913 (1983). This leaves juries "free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." *Id.* at 142; *see also Carpenter v. United States*, 484 U.S. 19, 25 (1987) (noting "ethereal" nature of judicially created right to honest services).

The vagueness of Section 1346 — a statute that applies to all fiduciaries, but that has particular application to public officials — presents two potential evils: selective prosecution of disfavored officials and diminished participation in the political process.

First, as this Court has recognized on numerous occasions, a vague statute "lends itself to selective enforcement against unpopular causes" and unpopular individuals. *NAACP v. Button*, 371 U.S. 415, 435 (1963); *accord Kolender v. Lawson*, 461 U.S. at 357; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972). In his dissenting opinion in *Margiotta*, Judge Winter noted this danger with respect to prosecutions under the "honest services" doctrine, which he described as "lodg[ing] unbridled power in federal prosecutors to prosecute political activists." 688 F.2d at 144; *see also id.* at 143 (noting "the potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors"). Or, as Professor Henning put it in discussing Section 1346, "[b]y not defining the scope of the statute," Congress has given federal prosecutors "a general legislative grant of authority . . . to 'call them as they see them.'" Henning, *Federal Fraud*, 36 B.C. L. REV. at 465.

It is widely perceived within the African-American community that its own elected officials are at particular risk of selective prosecution. *See* Helene Cooper, *A Question of Justice: Do Prosecutors Target Minority Politicians?*, WALL STREET JOURNAL, Jan. 12, 1996, at A1, A4 (noting growing view that an official's "race can draw an added measure of zeal from accusers and prosecutors"); Clarence Lusane, *In Perpetual Motion: The Continuing Significance Of Race And America's Drug Crisis*, 1994 U. CHI. LEGAL FORUM 83, 92 (contending that "black elected officials have been disproportionately targeted for investigation by law enforcement agencies"). Clearly, if a prosecutor sought to engage in selective prosecution, whether on the basis of race or for other reasons, a vague statute such as Section 1346 would facilitate his doing so.

Second, each time a public official is prosecuted under Section 1346 for otherwise permissible conduct, other individuals may be deterred from ever seeking public office. As Professor Moohr has observed:

> The mail fraud statute chills protected First Amendment political activity because it allows the selection of certain individuals for prosecution. . . . The threat of criminal sanctions may discourage people from participating in the political process at all.

Moohr, *Mail Fraud*, 31 HARV. J. LEGIS. at 180-81.

This deterrent effect may be felt with greatest force by individuals of modest means, who cannot support their families on what they earn as a member of a city counsel or a school board, which often is treated as only a part-time position. Yet, if they are employed by or have an interest in a private entity that has any dealings with the government, they, like petitioner here, may discover only too late that they violated Section 1346's vague and amorphous disclosure obligations.

Amicus applauds the role historically played by the U.S. Department of Justice and local U.S. Attorneys in protecting the right to vote. The significance of that right is diminished,

however, by their enforcement of Section 1346 against elected officials. When Congress allows federal prosecutors to criminalize selectively the accepted behavior of elected officials, the due process rights of those officials are abridged, the confidence of the citizenry in its ability to effect change through the ballot box wanes, and the exercise of political rights is chilled. *Amicus* fears that Section 1346's vague proscription against schemes to deprive the public of its "intangible right of honest services" will inevitably cause the political process to become less vibrant and less participatory.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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